Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978.

No. **78-426**

ANGELO GARZIA and JOANNE CONNOLLY GARZIA,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. .....

ANGELO GARZIA and JOANNE CONNOLLY GARZIA,

Petitioners,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

Petitioners pray that a writ of certiorari issue to review the memorandum decision of the New York State Court of Appeals upholding a no-knock search warrant issued by a Town Justice Court in Westchester County, New York.

Citation to the Opinions Below

The memorandum decision of the New York State Court of Appeals is reported

at N.Y.2d , N.Y.S. 2d (Appendix A).

The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which reversed the Westchester County Court order suppressing evidence seized under the warrant, is reported at 56 A.D.2d 635, 391 N.Y.S.2d 697 [2nd Dept. 1977] (Exhibit C).

The opinion of the Westchester County Court suppressing the evidence seized under the warrant is unreported (Exhibit D).

Jurisdiction

The memorandum decision of the New York State Court of Appeals was entered by the Westchester County Clerk in Liber 114 on June 12, 1978, and filed the same day under Westchester County Clerk Index No. 1026/75.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Were petitioners' Constitutionally guaranteed rights against illegal searches and seizures abridged by the execution of a warrant issued by the magistrate upon affidavits where affiant had personal knowledge of none of its contents, thus would be immune from perjury since the entire application for the warrant is based upon information and belief? Affiant did not identify his confidential informant and identified his source as merely officers in the Westchester County Sheriff's Department and the New York City Police Department (a combined 30,000 policemen).

CONSTITUTIONAL PROVISION INVOLVED

Amendment IV of the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF CASE

On July 9, 1975, Hon. Sante J. Chessari, a Town Justice of the Town of Mount Pleasant Justice Court, Westchester County, New York, issued the Warrant (Appendix B) challenged herein. The Warrant was supported by two separate "applications" in affidavit form only (Appendix B) executed the same date by a Westchester Sheriff's Department police officer with the assistance of an

Assistant District Attorney in the Westchester County District Attorney's Office in the preparation of one of them.

The Warrant authorized a no-knock day or night search of a "three story residence", having twelve rooms, several occupants, and several bedrooms, and the search of a "one Basil Garzia who resides" there "and for any other persons within this premises at the time of the search who may possess narcotics, dangerous drugs, and or controlled substances".

At approximately 11:15 P.M. the police, with guns drawn, broke into the subject premises in Gestapo style, made several arrests, then went downstairs to the basement where Angelo Garzia was watching television with his fiancée Joanne Connolly (now Mrs. Angelo Garzia) and arrested the two. He had no prior arrests and was 26 years of age at the

time, a high school graduate, Viet Nam veteran (U.S. Army 1968-1971 honorably discharged), and was and still is a paid full-time fire fighter for the Town of Greenburgh Fairview Fire Department, Westchester County. Joanne Connolly [Garzia], 24 years of age at the time, a graduate of the same high school, likewise had no prior arrests and was gainfully employed. Based upon the evidence seized in the basement room, they were thereafter indicted on a single count accusatory instrument charging possession of 24.3 ounces of marijuana.

On January 6, 1976, Hon. Lawrence N. Martin, Jr., Westchester County Court Judge, granted Mr. Garzia's motion and suppressed the evidence, holding that:

> "The difficulty with the affidavit in support of the warrant is that it is far too broad and deals

in generalities rather than specific facts."

The following day, on the basis of this holding, Judge Martin granted the same relief on motion of Joanne Connolly [Garzia] who is named as the only co-defendant in the same indictment.

The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, consolidated the Westchester County District Attorney's appeals from the suppression orders and, on February 22, 1977, reversed the County Court, holding as a matter of law, that:

> The applications in support of the warrant were "sufficient to establish probable cause", the warrant accurately described the premises and persons to be searched, and the assertions of the police that drugs could easily and quickly be disposed of and that the occupants were known as hunters and might possess firearms justified the "any time" and "no knock" provisions

of the warrant.

The Court of Appeals of the State of New York issued a certificate granting both Angelo Garzia and his wife leave to appeal to it from the Appellate Division reversal. On May 31, 1978 it rendered a memorandum decision, holding that

> The "proof" submitted to the issuing magistrate was sufficient and that individual identification and verification of the police observer or observers "would have been readily accessible to defendant -- thereby to expose any fabrication of the evidence".

AMPLIFIED REASONS FOR ALLOWANCE OF WRIT

In the courts below, Mr. Garzia challenged the applications for the warrant, complaining of the following:

(a) The Aguilar criteria (Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 [1964]) are based strictly and expressly

upon information and belief, and without disclosing the unidentified sources to the issuing magistrate.

(b) No indication whether Basil Garzia was known or identified by the confidential informant, affiant, or the unidentified sources.

(c) No indication whether the interior of the subject premises and its occupants were ever known or identified by the confidential informant, affiant, or the unidentified sources.

(d) No indication whether the issuing magistrate was made aware of any drugs on the subject premises other than those allegedly acquired by the confidential

informant from the person of Basil Garzia.

(e) No indication to the issuing magistrate that either the premises or any of its occupants were trafficing or ever known to traffic in drugs or engage in any illicit activity.

(f) No indication to the issuing magistrate whether on July 9, 1975 Basil Garzia was likely to be present or any on-going criminal enterprise present at the subject premises.

(g) The generalities and lack of specificity and detail furnished the issuing magistrate.

(h) The lack of corroboration or identification thereof furnished the issuing magistrate.

The Court of Appeals said that this information, or the identification and verification of the sources, "would have been readily accessible to the defendant -- thereby to expose any fabrication of the evidence". However, this information has not been revealed to date and there is no procedure by which to reveal it.

The New York Criminal Procedure Law §710.60[4] provides that if the nisi prius court does not summarily grant or deny the suppression motion,

> "it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath, except that unsworn evidence pursuant to subdivision two of section 60.20 of this chapter [permitting children under 12 years to testify without being sworn] may also be received. Upon such hearing, hearsay evidence

> is admissible to establish any material fact".

Even if the nisi prius court, that is, County Court Judge Lawrence N. Martin, had held a hearing, the same hearsay and complete lack of personal knowledge in the challenged applications would have (according to the New York Court of Appeals) been sufficient to establish any material fact. Thus the Court of Appeals erred when it held that the identification and verification of the material facts were "accessible" to the Petitioners herein.

Consonant with the 4th Amendment requirement of "Oath or affirmation" is the requirement that the affiant have personal knowledge of something. The affiant here does not purport to have personal knowledge of "a common investigation" (U.S. v. Ventresca, 380 U.S. 102,

12 L.Ed.2d 684, 85 S.Ct. 741 [1965]) nor anything else, and the New York State Court of Appeals concedes that the applications were not "detailed or specific" (Ventresca, supra).

Petitioners urge that Ventresca should not be used as a license to sidestep the 4th Amendment requirements. The present state of the law in New York suffers establishing "any material fact" by hearsay in the affidavit supporting the warrant as well as in any discretionary suppression hearing.

CONCLUSION

On the basis of the foregoing, this petition for a writ of certiorari should be granted.

Dated: White Plains, New York
September 7, 1978

Respectfully submitted,

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Appendix A -- Memorandum Decision of the New York State Court of Appeals affirming Appellate Division

State of New York
Court of Appeals

The People &c.,
Respondent,
vs.
Angelo Garzia,
Appellant.

The People &c.,
Respondent,
vs.
Joanne Connolly,
Appellant.

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(226) Richard S. Scanlan, White Plains, for appellant.
Carl A. Vergari, DA, Westchester Cty (Joseph Aviv & Anthony J. Severino of counsel) for respondent.

MEMORANDUM.

The order of the Appellate Division should be affirmed.

We cannot say that the Appellate Division erred as a matter of law in concluding that there was probable cause for the issuance of this search warrant. Proof was submitted to the issuing

magistrate that an informer, without any marijuana on his person, had entered the premises in question in which one Basil Garzia resided, that the informer said that he had then purchased the alleged marijuana from Basil Garzia, and that the informer left the premises carrying a plastic bag which appeared on field examination to contain marijuana.

The source of this information was observations made by police officers of the Westchester County Sheriff's Office, not individually identified. For the protection of the informer, the date of the transaction was fixed with no greater particularity than to say that it occurred between the 3rd and the 9th of July, 1975. The search warrant was issued and executed on the latter date.

While we agree with appellant that individual identification of the police

observer or observers might have been preferable (as would have been specification of the date), such identification and verification of the proof would have been readily accessible to defendant -- thereby to expose any fabrication of the evidence. Nor on any view was the proof stale. Again, we note the high desirability of the practice of obtaining warrants, and would, albeit reluctantly, rely on inferences reasonable to be drawn from an affidavit prepared by a draftsman concededly unskilled in legal matters to support conclusions reached at the Appellate Division.

The affidavits in this case provide no proper model, however, and similar occasions for litigation over inadequately or incompletely expressed ideas should be avoided.

* * * * * * * * * * *

Order affirmed, in a memorandum. All concur.

Decided May 31, 1978

APPENDIX B -- Search Warrant and Applications therefor

STATE OF NEW YORK
COUNTY OF WESTCHESTER

Town Court, Town of Mount Pleasant

To any police officer of the Town of Mount Pleasant Police Department or the Westchester County Sheriff's Department.

YOU ARE HEREBY directed to search the premises located at 114 Amsterdam Avenue, Hawthorne, New York which is described as a three story residence, brownish-yellow in color, the person of one Basil Garzia who resides at the above address and for any other persons within this premises at the time of the search who may possess narcotics, dangerous drugs, and or controlled substances. for the following property:

any narcotics, dangerous drugs and/or controlled substances and narcotics paraphernalia and money used to purchase narcotics, dangerous drugs and/or controlled substances, including but not limited to heroin and its derivatives, cocaine, marijuana, and any narcotic implements or instruments, used to or adapted for use in packaging, or preparing narcotics and/or dangerous drugs and/or controlled substances and any barbituates or amphetamines, and other paraphernalia, possession of which is in violation of the Penal Law and/or the Public Health Law of the State of New York.

IF ANY SUCH PROPERTY IS FOUND, you are directed to seize the same and, without unnecessory delay, return and

deliver to this court such property together with this warrant.

* YOU ARD DIRECTED TO EXECUTE THIS WARRANT:

AT ANY TIME OF THE DAY OR NIGHT.

* YOU ARE AUTHORIZED, IN THE EXECUTION OF THIS WARRANT, TO ENTER THE PREMISES TO BE SEARCHED WITHOUT GIVING NOTICE OF YOUR AUTHORITY AND PURPOSE.

This search warrant issued this 9 day of July, 1975.

SANTE J. CHESSARI
(Signature of Judge or Justice)
Town Justice—Town of Mt. Pleasant
(Title)

* Strike out items not applicable or authorized.

Search Warrant Application C.P.L. 690.45.

STATE OF NEW YORK
COUNTY OF WESTCHESTER

TOWN COURT, TOWN OF MT. PLEASANT, N.Y.

PAUL T. GRUTZNER, a police officer of the Westchester Sheriff's Department, Valhalla, N.Y., does hereby make application for a search warrant pursuant to the provision of Article 690 of the Criminal Procedure Law and in connection therewith states as follows:

First: There is reasonable cause to believe that certain property, to wit: any narcotics, dangerous drugs and/or controlled substances and narcotics paraphernalia and money used to purchase narcotics, dangerous drugs and/or controlled substances, including but not limited to heroin and its derivatives, cocaine, marijuana, and any narcotics implements and/or instruments, used to or adapted for use in administering, packaging, preparing narcotics, dangerous drugs and/or controlled substances and any amphetamines or barbiturates, and other paraphernalia possession of which is in violation of the Penal Law and/or the Public Health Law of the State of N.Y. may be found in or upon the following designated or described place, vehicle or person, to wit: the premises located at 114 Amsterdam Avenue, Hawthorne, New York, which is described as a three story residence brownish-yellow in color, and for the person of one Basil Garzia who resides at the above address and for any other persons within this premises at the time of the search who may possess narcotics, dangerous drugs and/or controlled substance.

Second: The following allegation of facts are submitted in support of the above statement: Between the days of

July 3rd and July 9th, 1975 a tried and tested confidential informant of the Westchester County Sheriff's Department, hereinafter identified in this affidavit as C.I. #151, entered the premises located at 114 Amsterdam Avenue, Hawthorne, New York. The purpose of the informants entrance was to purchase a quantity of alleged marijuana. Within said premises C.I. #151 met one Basil Garzia who resides at said premises. At a time in the mid-evening C.I. #151 did in fact purchase a quantity of alleged marijuana from the said Garzia for an amount of money agreed upon by Garzia and the informant.

The above allegations of fact:

*2) are based upon information and belief, the sources of such information and the grounds of such belief are as follows:

1) The fact that C.I. #151 was observed entering the Garzia premises by a Police Officer of the Westchester County Sheriff's Office.

2) The fact that C.I. #151 was observed exiting the Garzia residence carrying a plastic bag which contained a brownish substance which appears to be and has the odor of marijuana.

3) The fact that C.I. #151 stated that the above described substance was purchased from Basil Garzia.

Wherefore, the applicant requests that this Court issue a search warrant directing a search for and a seizure of the above described property in or upon the above designated or described place, vehicle or person.

The applicant makes further request that such search warrant be made executable at any time of the day or night on the grounds that there is reasonable cause to

believe:

*2) that the property sought will be removed or destroyed if not seized forthwith,

the basis for such belief is based on the following facts:

1) Narcotics, dangerous drugs and controlled substance can be easily and quickly destroyed or disposed of by burning, flushing or other means.

The applicant makes further request that such search warrant authorize the executing police officer to enter premises to be searched without giving notice of his authority and purpose on the grounds that there is reasonable cause to believe that

*1) the property sought may be easily and quickly destroyed or disposed of,

*2) the giving of such notice may endanger the life or safety of the executing police officer or another person

the basis for such belief is based on the following facts:

1) Burning, throwing or flushing will quickly dispose of narcotics, dangerous drugs and/or controlled substances.

2) The subject Basil Garzia and Butch Garzia are known as hunters and therefore may possess firearms.

Subscribed and Sworn to
before me this 9 day of
July, 1975.

SANTE J. CHESSARI

PAUL T. GRUTZNER
Police Officer

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* Strike out items not applicable or sought.

Application for a Search Warrant and Order of Seizure for the Person of Basil Garzia and His Premises at 114 Amsterdam Avenue, Hawthorne, New York.

This quantity of alleged marijuana was immediately given to the Criminal Investigator who had been assigned to escort C.I. #151, upon the confidential informants return to the vehicle which brought this informant to the Garzia residence.

The alleged marijuana purchased by C.I. #151 was analyzed and determined to be marijuana by the following means:

1) Observations—The substance purchased by C.I. #151 was visually examined by your deponent and another Police officer of the Westchester County Sheriff's Department.

2) Texture— The substance purchased was phyically examined by your deponent. The texture of this substance is the same as marijuana.

3) Odor— The burnt odor of the substance smells the same as marijuana.

Based upon the five years experience of your deponent as a police officer assigned to the Westchester County Sheriff Department's Narcotics Squad—two and one-half years of which as a narcotics undercover agent with prime responsibility being the purchase of narcotics, dangerous drugs and controlled substances—the substance purchased by C.I. #151 from the said Basil Garzia is definitely marijuana.

Sworn to before me this
9th day of July, 1975

PAUL T. GRUTZNER
Paul T. Grutzner
Criminal Investigator

SANTE J. CHESSARI
Judge—Mount Pleasant, N.Y.

Application for a Search Warrant and Order of Seizure for the Person of Basil Garzia and His Premises at 114 Amsterdam Avenue, Hawthorne, New York.

The following statements are made in further support of the application for a warrant to search 114 Amsterdam Avenue, Hawthorne, New York and the person of one Basil Garzia:

Upon information and belief the source of which is conversations with brother police officers of the New York City Police Department, C.I. #151's proven reliability is that C.I. #151 has supplied the New York City Police Department with information which has lead to the arrest of at least four (4) individuals for sale and possession of narcotic and sale of narcotics during approximately the past six weeks. Charges are currently pending in the New York City Criminal Court against these individuals. To reveal the identity of these individuals at the present time would jeopardize ongoing police investigations and could endanger the safety of C.I. #151.

Your deponent further states that at the time C.I. #151 entered the above mentioned premises not marijuana was on C.I. #151's person.

Sworn to before me this
9th day of July, 1975

PAUL T. GRUTZNER
Paul T. Grutzner
Criminal Investigator

SANTE J. CHESSARI
Judge—Mount Pleasant, N.Y.

Appendix C -- Opinion of the Appellate Division reversing Westchester County Court suppression order

56 A.D.2d 635

The PEOPLE, etc., Appellant,
v.
Angelo GARZIA, Respondent.

The PEOPLE, etc., Appellant,
v.
Joanne CONNOLLY, Respondent.

The PEOPLE, etc., Appellant,
v.
Basil GARZIA, Respondent.

The PEOPLE, etc., Appellant,
v.
Pamela GARZIA, Respondent.

The PEOPLE, etc., Appellant,
v.
Ronald COSTELLO, Respondent.

Supreme Court, Appellate Division,
Second Department.

Feb. 22, 1977.

Carl A. Vergari, Dist. Atty., White Plains (Joseph Aviv, White Plains, of counsel), for appellant.

Richard S. Scanlan, White Plains, for respondent Angelo Garzia.

John Patrick Gorman, White Plains,

for respondent Basil Garzia.

Perone & Tenzer, White Plains (Michael L. Tenzer, White Plains, of counsel), for respondent Pamela Garzia.

Boeggeman, George, Jannace, Katz & O'Kelley, P.C., White Plains (Giangrande & Herold, White Plains, J. Radley Herold, White Plains, of counsel), for respondent Ronald Costello.

Before COHALAN, Acting P.J., and DAMIANI, HAWKINS, MARGETT and MOLLEN, JJ.

MEMORANDUM BY THE COURT.

Consolidated appeal by the People from five orders of the County Court, Westchester County (one as to each defendant), four dated January 8, 1976, and one (as to defendant Ronald Costello) dated January 22, 1976, which granted the branches of defendants' respective motions which sought suppression of certain physical evidence.

Orders reversed, on the law, and the said branches of the motions are denied.

[1,2] The affidavit in support of

the search warrant and the search warrant application are sufficient to establish probable cause for its issuance (see People v. Gerace, 55 A.D.2d 626, 389 N.Y.S.2d 555 [2d Dept., dec. Dec. 13, 1976]; People v. Hanlon, 36 N.Y.2d 549 369 N.Y.S.2d 677, 330 N.E.2d 631). Moreover, the warrant accurately described the premises and persons to be searched (cf. People v. Nieves, 36 N.Y.2d 396, 369 N.Y.S.2d 50, 330 N.E.2d 26).

[3] The assertions by the police that the items to be seized were drugs which could be easily and quickly disposed of, and that the occupants of the house were known as hunters and might possess firearms, justified the "any time" and "no knock" provisions in the warrant.

COHALAN, Acting P.J., and DAMIANI and HAWKINS, JJ., concur.

MARGETT and MOLLEN, JJ., concur in

the result under the constraint of People v. Gerace, 55 A.D.2d 626, 389 N.Y.S.2d 555 (2d Dept., dec. Dec. 13, 1976); see, also, People v. Rose, 31 N.Y.2d 1036, 342 N.Y.S.2d 66, 294 N.E.2d 852.

APPENDIX D -- Opinion of the Westchester County Court suppressing evidence seized under the Warrant

COUNTY COURT : WESTCHESTER COUNTY

75-1026

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

ANGELO GARZIA,

Defendant.

MARTIN, J.

The defendant Aneglo Garzia who was indicted for the crime of Criminal Possession of a Controlled Substance in the Fifth Degree moves for suppression of tangible physical evidence on the ground that there was no probable cause for the issuance of the search warrant.

The affidavit in support of the warrant was made by a police officer of the Westchester County Sheriff's Department who alleged that "between the day of July 3rd and July 9th, 1975 a tried and tested confidential informant * * * entered the premises located at 114 Amsterdam Avenue in Hawthorne, New York" for the purpose of making a purchase of marijuana and that he did in fact "purchase a quantity of alleged marijuana from the said Garzia for an amount of money agreed upon by Garzia and the informant."

The difficulty with the affidavit in support of the warrant is that it is far too broad and deals in generalities rather than specific facts. From a reading of the affidavit it is impossible to discern the date or time of day when the purchase was made. Moreover, the test set forth in

People v. *Hendricks* (25 N.Y. 2d 129) for establishing the reliability of an informant has not been met since the information furnished by the informant although leading to arrests did not result in any convictions. The sole evidence upon which the warrant was issued consists of one isolated observation by the police officer at some unspecified time during a seven day period to the effect that he saw the informant entering the premises occupied by the defendant and that when he exited from the premises he had a bag of marijuana on his person. The court determines that the complete absence of any corroborative evidence and the lack of detail and specificity result in a failure to establish the probable cause necessary for the issuance of a search warrant. Accordingly, the motion to suppress physical evidence is granted. The request for alternate relief seeking identity of the informant is denied.

The foregoing constitutes the decision and order of the court on this motion.

Dated: White Plains, New York
January 8, 1976.

Lawrence N. Martin, Jr.
LAWRENCE N. MARTIN, JR.
County Court Judge

HON. CARL A. VERGARI
District Attorney
RICHARD S. SCANLAN, Esq.
Attorney for Defendant Garzia

Supreme Court, U. S.
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OCTOBER TERM, 1978

No. 78-426

ANGELO GARZIA and JOANNE CONNOLLY GARZIA,

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against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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JANET CUNARD
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IN THE

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OCTOBER TERM, 1978

No.

ANGELO GARZIA and JOANNE CONNOLLY GARZIA,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

Facts

Sometime between July 3 and July 9, 1975, a confidential informant of the Westchester County Sheriff's Office and the New York City Police Department went to the house where the defendant and his family resided. The informant was observed, by an officer of the Sheriff's Office, entering the premises and then exiting. At the time of the entry, the informant had no marijuana on his person and when he exited he carried a plastic bag containing a brownish substance which the experienced narcotics officer, for stated reasons, believed to be marijuana. In addition,

the informant, who had previously given reliable information and had gone to the premises to purchase marijuana told the officers that he had bought the marijuana from Basil Garzia, a resident of the premises.

The warrant was signed and executed on July 9, 1975. The officers seized varying amounts of marijuana from the rooms occupied by Angelo Garzia (in which Joanne Connolly was present), Basil Garzia, Pamela Garzia and Ronald Costello.[1]

POINT I

The petition is not timely.

The order of the New York Court of Appeals was signed on May 31, 1978[2] and filed in the office of the clerk of that court on that day (CPLR § 5525(a)). The case was remitted to the County Court of Westchester and the order filed in the office of the clerk of that court on June 5, 1978. The last day to file a petition for certiorari was August 29, 1978 (Revised Rules of the Supreme Court of the United States, Rule 22), the petition was not filed until September , 1978.[3]

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[1] Pamela Garzia plead guilty to attempted criminal possession of a controlled substance in the seventh degree. Basil Garzia and Ronald Costello plead guilty to criminal possession of a controlled substance in the seventh degree.

[2] The copy of the decision to which petitioner refers in his jurisdictional statement is one which was filed by the District Attorney to indicate additional service by him on counsel.

[3] The District Attorney received the petition on September 11, 1978.

POINT II

The judgment of the New York Court of Appeals is not final.

The defendant invokes jurisdiction under 28 U.S.C. 1254(1). However, the instant case was not heard by a court of appeals and the section does not give jurisdiction. Jurisdiction would lie only under 28 U.S.C. 1257(3) which mandates a final judgment. There has been no trial in the instant case and hence no final judgment. As the decision by the state court is one merely "determining the admissibility of evidence in, the state proceedings still to come," the exceptions to the finality rule do not apply. (*Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975)).

POINT III

The search warrant was properly issued.

A confidential informant of the New York City Police Department and the Westchester County Sheriff's Office carrying no marijuana, entered the defendant's premises to purchase marijuana (B-7). The informant exited the premises carrying a brownish substance which had the odor of and appeared to be marijuana (B-4). Based upon the texture, odor and burnt odor of the substance, the applicant, who was an experienced narcotics officer, concluded that the substance was in fact marijuana (B-6).

Insofar as a search of the Garzia premises was concerned (and that is the only search with which the defendants are concerned), the above was sufficient to support the issuance of a search warrant for marijuana. Additionally, the informant, who had previously proven his reliability (B-7), told the officers that he had purchased the marijuana from Basil Garzia (B-4), a resident of the premises (B-3).

While the application may have been inartfully drawn, that is not cause to find the warrant invalid. The officer set forth facts from which a determination that probable cause for the issuance of a search warrant existed could properly be made by the magistrate. The search warrant was properly issued on an application setting forth probable cause (*United States* v. *Ventresca,* 380 U.S. 102 (1965)).

The defendant argues that the fact that the application was based solely upon information and belief was a violation of his constitutional rights. The application was not solely so based and even had it been, would have been sufficient (*United States* v. *Ventresca, supra*). In any event, whether or not the informant must be identified is solely a question of state law and not one of constitutional dimension (*McCray* v. *Illinois,* 386 U.S. 300 (1967)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONERS' BRIEF IN REPLY

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-426

ANGELO GARZIA and JOANNE CONNOLLY GARZIA,

Petitioners,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITIONERS' BRIEF IN REPLY

TIMELINESS

Respondent's attorney would have suitor's to the court guessing the prosecutor's private "finality" date rather than the date of entry which the official public libers indicate and upon which the public relies in each of the 62 counties in New York.

It is established law in New York that a judgment or order is not final or effective until entered Knapp v. Roche, 82 N.Y. 366 (1880); Hastings v. Twenty-Third Ward Land Improvement Co., 46 App. Div. 609, 61 N.Y. Supp. 998 (1st Dept. 1900); Coclin Tobacco Co. v. Griswald, 408 F.2d 1338 (1st Cir. 1969), cert. den. 396 U.S. 940, 24 L.Ed.2d 241, 90 S.Ct. 373.

This rule is applicable as well to orders or judgments of an appellate court upon remittitur. Litchfield Construction Co. v. The City of New York, 219 A.D. 369, 220 N.Y. Supp. 6 (1st Dept. 1927).

The true copy of the Court of Appeals "Memorandum", "Decided May 31, 1978", bears the following notation at the beginning thereof:

> "This memorandum is uncorrected and subject to revision before publication in the New York Reports".

It was a copy of this memorandum which the Court of Appeals sent to the writer of this brief, and it was a copy of it which the Court of Appeals sent or remitted to the Westchester County Clerk along with the "Original" Record on Appeal for entry in Liber 114.

FINALITY

Respondent has now shifted to an inconsistent position. On January 14, 1976 it filed an affidavit pursuant to the New York Criminal Procedure Law §450.50[1] representing to the Appellate Division that Judge Martin's suppression of evidence rendered the People's case "so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed".

The illegality of the seizure is res judicata in New York. Therefore, if

Petitioners were to now plea guilty or be found guilty after trial and judgment of conviction entered, they would be put through the time consuming and costly appellate route once again, this time with a larger and more costly record, only to find that an affirmance of conviction by the Appellate Division is not reviewable by the Court of Appeals as a matter of right and, moreover, the issue of illegality of search and seizure is barred because it has already been litigated.

The New York Legislature enacted Criminal Procedure Law §450.50[2] so that the "order suppressing evidence constitutes a bar to the prosecution of the accusatory instrument" and thus treats the order as a final judgment.

Petitioners are entitled to have the 1975 accusatory instrument and attending

issues resolved quickly because justice delayed is justice denied. Justinian's Institutes, liber 1, title 2, Section 56 (Black's Law Dictionary, 4th Ed. West Pub. Co. 1951, p. 1004). The delay has been occasioned because the People resorted to this appellate process, not the Petitioners.

Dated: White Plains, New York
October 17, 1978

Respectfully submitted,

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